David Shoebridge MLC
Member of the NSW Legislative Council

The Greens NSW
Submission
5 April 2013

Greens NSW Submission

RE: Reforms to the NSW Compulsory Third Party Green Slip Insurance Scheme

Dear Motor Accidents Authority,

Thank you for the opportunity to make a submission on the proposed reform to the NSW Compulsory Third Party Green Slip Insurance Scheme.

The Greens do not support the proposed changes to the NSW CTP Green Slip Insurance Scheme in summary because the changes will not work to substantially address the underlying causes of cost increases in the scheme and will deliver substantial cuts to benefits received by many injured road users in NSW.

It is not clear how the options for reform have been developed, but they appear to be based on a very selective view of the operation of the Victorian model and are blind to a number of key factors that differentiate the proposed NSW model including:

(a) The fact that the Victorian scheme is government underwritten and government managed and therefore has reduced management and underwriting costs that will not apply to the proposed privatised NSW scheme; and

(b) The fact that the Victoria scheme's current premiums are lower in part due to that scheme being in temporary deficit in the order of $1 billion, a deficit that can be recovered in time with government underwriting which is an option not generally available to private underwriting schemes.

The most significant determinant of the cost of a CTP premium is not whether the scheme is fault or no-fault based, but rather whether or not the scheme is publicly or privately underwritten and managed. Nationally the average cost of CTP premiums as a percentage of average weekly earnings (AWE) is 25% of AWE for schemes that are publicly underwritten and managed compared to 32% of AWE for schemes that are privately managed.[1] This fact is simply, and inexplicably, ignored in the government's discussion paper.

If the government was serious about reducing premiums it would closely consider government management and underwriting of the scheme such as occurs in WA, Tasmania, Victoria and the NT and deliver the inevitable savings from such a scheme directly to motorists. One of the most obvious benefits of this approach would be to return the average 20% of premiums currently gouged by private insurers as profits back to the motorists either as reductions in green slip prices or as additional statutory no-fault benefits.

[1] The three schemes that are both privately underwritten and privately managed also have a relatively high cost of 30.3% of AWE.

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Ongoing scheme failures raised in the inquiries of the Law and Justice Committee into "The exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council" have in the main not been considered explicitly in the discussion paper.

This committee has considered the scheme regularly and accepted submissions from members of the public, organisations and insurance companies. The outcomes of this consideration have been a number of detailed reports which identify significant problems with current scheme operation. That the current proposals from the Government to reform the scheme fail to engage with this body of expertise on the subject is disappointing.

I note that this initial consultation document sets out the principles that will underpin reform, rather than detail about how this reform will be implemented. This submission considers the various proposed reforms, followed by a brief discussion of some additional principles that should also be taken into consideration as part of reforming this scheme, these include:

- Excessive insurance company profits
- Other factors increasing prices
- Administrative costs
- Concerns about retrospectivity

Please do not hesitate to contact my office at david.shoebridge@parliament.nsw.gov.au or (02) 9230 3030 if you have any questions regarding this submission or require further information.

Regards,

David Shoebridge
Greens NSW MP

This submission will address the summary of proposed reforms in the February 2013 discussion paper.

Proposed reform: statutory defined benefits for all injuries

The Greens believe that the benefits paid to people injured on the roads, through no fault of their own, should so far as possible match the damage they have suffered and compensate them for the costs they will inevitably incur as a result of the injury. Capped and defined statutory benefits as proposed by the government will not achieve this outcome.

While the quantum of defined benefits proposed by the government is not made clear, it is inevitable that the defined statutory benefits will operate as a significant reduction of benefits in many cases. These "one-size-fits-all" payments will not be designed, indeed cannot be designed, to fully compensate injured people for the cost of their injuries. This will likely lead to many injured people being placed under substantial financial pressure.

The consultation paper refers repeatedly to providing incentives for people to recover and return to work. The most recent experience of the reforms to the Workers Compensation scheme, which were delivered under the guise of similar language, produced greatly reduced benefits and caps on duration and quantum that were said to "incentivise" injured people so they would return to work.

The Greens oppose changes that propose to cut people's benefits so that they are either forced into poverty or forced to return to work when they are unfit due to injury.

The consultation paper suggests that a no fault scheme will mean that injured people can be assisted more quickly with claims being resolved faster. While speeding up the process is supported, it is likely that the reduction in payments that injured people receive under the proposed scheme will result in substantially poorer outcomes for many injured road users. The Government's proposal for greater certainty of a much smaller payment is not inherently an improvement over a less timely payment that actually compensates for medical, employment and other expenses.

However the Greens would support reforms that broaden the benefits payable on a no-fault basis and would support any moves by the government to redirect the average 20% of premiums that has been historically gouged from the scheme for private insurer profits to at-fault road users for greatly improved benefits. This would best be done by moving towards a government underwritten and government managed scheme as occurs in the majority of other States.

It is also likely that under such a scheme, people's rights to appeal against what they perceive to be unfair determination of benefits will be reduced. The lack of detail in the government's discussion paper makes this aspect of the reform impossible to fully address, however reference to the current dysfunctional workers compensation dispute resolution process is cause for real concern.

Proposed reform: Access to common law retained for injuries with greater than 10% WPI

The Greens support retention of the option to recover common law damages for all road users who are injured by the use or operation of a registered vehicle through no fault of their own.

The proposal to retain the common law system for those who are seriously injured demonstrates the lack of confidence that the Government has that statutory compensation will adequately cover the cost of injury. As is noted above, this lack of confidence is well-founded.

The rationale for this retention is provided at 3.6 of the consultation paper – "those who receive these types of injuries should be, within the limits of what the Scheme can afford, compensated for their permanent loss".[2] The implication here is that those who have not received such injuries will have a lesser set of rights to compensation – giving an indication that the statutory compensation proposed will be significantly lower than would be required to compensate injured people for their injuries and losses.

The 10% WPI threshold is arbitrary and the AMA 4 guidelines on which it is based explicitly state that they are not an appropriate measure for the determination of a person's actual incapacity or injury. One obvious illustration of that is that a construction worker with a modest but permanent back injury may lose all of his or her earning capacity but the same injury to a government Minister would likely lead to little economic loss.

It is understood that the proportion of injured road users who are presently entitled to be assessed at greater than 10% WPI represent only around 2% of claimants under the existing scheme. Therefore the Government's proposed protections are of a very limited nature and will lead to many people with quite serious injuries being grossly under-compensated.

Proposed reform: Regular payments for those with ongoing treatment and support – converted to a lump sum after stabilisation

Under the existing scheme, medical expenses are paid while negotiation and dispute processes are undertaken. The majority of compensation payments after any disputes are paid out between three and five years after the accidents.[3]

Under the proposed scheme, defined benefits will be used by insurers to pay claimants their lost earnings on a fortnightly system, with the capacity to convert the claim on injuries that are stabilised. It is unclear whether there will be any access to payments for care and domestic assistance – currently one of the parts of the scheme where there has been an increase in requests.[4]

[2] *Reforms to the NSW Compulsory Third Party Green Slip Insurance Scheme*, February 2013, page 10.
[3] *Reforms to the NSW Compulsory Third Party Green Slip Insurance Scheme*, February 2013, page 3.
[4] *Reforms to the NSW Compulsory Third Party Green Slip Insurance Scheme*, February 2013, page 7.

The consultation paper holds that "there is little incentive for the injured person to get better" – arguing that a need to continue to prove disability or incapacity is an incentive to slow recovery and "creating a lump-sum compensation mind-set".[5] There is no evidence presented for this claim, and it is considered highly dubious.

The consultation paper is littered with examples of lengthy, costly and delayed dispute resolution. It is suggested that this is a result of the scheme being based on fault. However the majority of the disputes identified are not strictly on questions of negligence but are instead on issues of injury, incapacity, and quantum and the failings identified are more likely to be a result of private insurers' poor claims management skills and profit motive that the nature of an at-fault scheme. Even a cursory review of the functioning of other CTP schemes from across Australia would support this conclusion.

The Greens would support a simple, defined benefit no-fault option being available to injured road users together with the retention of common law benefits tailored to their actual loss and injury, with an election being made by the injured road user on receipt of independent legal advice.

Proposed reform: Lost income according to work capacity and functional assessment capped as in NSW Workers compensation scheme, converted to lump sum for those with ongoing incapacity

It is always a concern when a proposal looks towards the much maligned NSW Workers Compensation scheme for a model of how to operate as at 3.4 which states that "where applicable, payments will mirror NSW workers compensation provisions for lost earnings, including capped lost earnings thresholds".[6]

The discussion paper asserts that this change will result in better outcomes for most injured people who will "see better outcomes than at present". The NSW Workers Compensation changes have produced disastrous consequences for thousands of injured people in this State and they are an appalling model to adopt for the CTP scheme.

The existing CARS model for dispute resolution is a far preferable option to determine incapacity. It is a low cost scheme with decisions tailored to the individual circumstances of the case and on the publicly available information, has strong support from all existing stakeholders in the system.

Proposed reform: Lump sum payment for permanent impairment on a sliding scale, based on impairment threshold

Again without seeing the sliding scale that is proposed the full impacts of such a change are difficult to gauge. As noted above, the AMA 4 guidelines on which such a scale is likely to be based explicitly state that they are not an appropriate measure for the determination of a person's actual incapacity or injury.

[5] *Reforms to the NSW Compulsory Third Party Green Slip Insurance Scheme*, February 2013, page 3.
[6] *Reforms to the NSW Compulsory Third Party Green Slip Insurance Scheme*, February 2013, page 10.

In this regard we again refer to the obvious comparison between a construction worker with a modest but permanent back injury who may well lose all of his or her earning capacity as against a government Minister with the same injury who would likely suffer little economic loss. Equally such a one-size-fits-all scheme ignores other important factors such as a young person who receives a permanent injury will, on average, suffer the effects of that injury for significantly longer than an older person with the same injury and any compensation should ordinarily reflect this.

While we note that a safeguard is proposed for this with claims assessors required to approve all offers of settlements or commutations made to unrepresented claimants, the operation of similar safeguards in the workers compensation scheme have shown them to be largely ineffective.[7]

Proposed reform: "Measures to streamline the experience for claimants including less complex system entry procedures and improved support mechanisms for claimants"

Section 3.5 of the consultation paper proposes a simpler entry to the scheme so that injured people will need to make a single notification of an accident to get into the system – the current distinction between early accident notification and full claim will be removed.

This section further proposes that "insurers will be encouraged to adopt a streaming approach to claims management, with proactive support given to people with claims for lost and future earnings to help them rehabilitate to the workforce, just like TAC in Victoria."[8]

Objectives like "reducing the incentive for injured people to obtain legal advice", can often result in people being not aware of their rights and entitlements. In a situation where the insurance companies will have access to legal advice when they are dealing with claimants, it will be inequitable for claimants to not also have legal advice.

The rationale for this change appears to be the sheer cost of lawyers under the existing scheme – the consultation paper identifies that since 1999 "more has been spent on lawyers in the NSW Scheme than on medical and related treatment costs".[9] Furthermore the complexity of the existing system is argued to mean that claimants feel they have to engage lawyers to help with their claim.

This fails to recognise the role of private insurers in contesting claims and using their sizeable legal teams to avoid liability wherever possible. The problem, put simply, is not people getting lawyers to help with their claims – but the bullish opposition from insurance companies determined to exploit every possible loophole to minimise payments and maximise profits.

The role of insurance companies in increasing the time between claims and payments should also be considered in light of the profit motive for insurers who can retain premiums as investments

[7] *Reforms to the NSW Compulsory Third Party Green Slip Insurance Scheme*, February 2013, page 10.
[8] *Reforms to the NSW Compulsory Third Party Green Slip Insurance Scheme*, February 2013, page 10.
[9] *Reforms to the NSW Compulsory Third Party Green Slip Insurance Scheme*, February 2013, page 3.

and by this profit from the income received on the investments. Seen in this light the lengthy, costly and complex disputes are more likely a result of private insurers' poor claims management skills and profit motive than any inherent complexity in the scheme.

Proposed reform: Simpler and more accessible alternative-to-court dispute resolution services

The Greens support moves towards alternative dispute resolution as a general principle, but with a series of protections to ensure that the inevitable power imbalance between professional, well-resourced insurers on the one hand, and injured road users on the other, is not open to exploitation. Without further detail however it is uncertain if such a move will reduce access to appeal rights and a right to be represented for those people who need this.

Again we note that the existing CARS model for dispute resolution is a low cost scheme with decisions tailored to the individual circumstances of the case and, on the publicly available information, supported by all existing stakeholders in the system.

Proposed reform: Statutory defined benefits to extended to all injured persons regardless of fault (except in serious cases of negligence of self-harm)

The government's proposal is that statutory defined benefits will be the central part of a no fault compensation scheme and that serious cases of negligence, criminal activity, intoxication or self-harm will result in payments being denied.

While a less adversarial system is appealing, ultimately insurance companies and injured people do not have the same access to information and resources, and it is considered that a move to a no fault system would disadvantage injured people on the whole.

While an expanded set of benefits on a no-fault basis is supported by the Greens, the whole-sale move towards statutory defined benefits will inevitably result in substantially lower payments to many injured road users.

It is noted that according to the consultation paper there are around 7,000 people a year who cannot access even the basic $5,000 of benefits currently available because they cannot establish fault or were in a single vehicle accident.[10] Any changes to the Green Slip system should include a way to provide support for these people, but limiting all injured workers to statutory benefits is not required for this.

The Greens would support reforms that broaden the benefits payable on a no-fault basis and would support any moves by the government to redirect the average 20% of CTP premiums that have been historically gouged from the scheme for private insurer profits towards at-fault road users for greatly improved benefits. This would best be done by moving towards a government underwritten and government managed scheme as occurs in the majority of other States.

[10] *Reforms to the NSW Compulsory Third Party Green Slip Insurance Scheme*, February 2013, page 3.

Proposed reform: Only common law lump sum payments affected by degree of fault, which will be set by schedule to remove disputes

As is noted above this proposal will protect the rights of only a tiny minority of injured road users (estimated at 2% of current CTP claimants).

The Greens believe that all injured road users should retain the right to seek common law damages together with an option for a simpler, defined benefit payment being available as an alternative with an election being made by the injured road user on receipt of independent legal advice.

Proposed reform: Provision of clearer definitions around what is classified as contributing to fault

Clearer definitions are generally supported although without an indication of what these will be it is difficult to provide detailed comment.

Proposed reform: Measures to reduce overhead costs, streamline purchasing and reduce red tape in the Scheme

There are a series of reforms proposed to deal with the current problems created by insurer behaviour and market failure in the privately underwritten and privately managed CTP scheme.

All of these current problems would be resolved by moving to a government underwritten and government managed scheme as operates in four other States.

Currently the only limit to pricing for insurers is the existence of caps – based on assumptions about ongoing costs of the scheme and an estimated 8% profit. Consistently poor assumptions by these companies mean that these caps are currently set at levels that allow profits substantially above this, averaging around 24%. When discussion paper uses these terms it is worth noting that the only possible flexibility here is the flexibility for insurance companies to charge more.

Additional reform for consideration: Excessive insurance company profits

When considering the Scheme Efficiency much is made of the 12% of costs which are attributed to legal and investigation costs. These costs are being used as justification for a move towards a no fault scheme. Less time and consideration is devoted to the 20% of total costs that insurers profits have accounted for over time, together with the 16% costs paid to private insurers to manage the scheme.

It is worth noting that the two schemes with the highest premiums – namely NSW at $518 and the ACT at $526 - both have claims under the scheme managed by private insurance companies. The

discussion paper makes strong arguments that the fault based or non-fault based nature of the schemes is the driving factor in price, but the evidence presented in the table on Premium affordability by state on page 5 does not paint such a black and white picture.

Insurance company profits from green slips are extraordinarily and unsustainably high –they have been fairly characterised in the past as "super profits" for this reason. As has been repeatedly shown, insurance company estimates of green slip costs required to affect an 8% profit are exceedingly pessimistic. Rather than making an 8% profit (the level that the Government has determined is reasonable in the circumstances) insurance companies have over time made 20% average profits.

The consultation paper explains this as "higher than predicted profit margins because of the uncertain nature of the scheme".[11] It is difficult to see, over the longer term, where this uncertainty is. Insurance companies consistently offer up pessimistic predictions of their profits when making applications regarding the maximum cost of Green Slips, and consistently record profits in the order of 20%. These rogue profits are consistently achieved by insurance companies, as data from the last 10 years clearly shows. The higher cost of GreenSlips in NSW can be substantially attributed to the extra impost required to satisfy these profits.

The principles for reform outlined in the consultation paper suggests that "faster resolution of claims leads to reduced risk for insurers, enabling lower prices, lower and more certain profit margins with fewer opportunities for super-profit".[12] Given the certainty of super-profits over the past decade it is unclear how such a mechanism is figured to work.

A far better option would be to have the scheme government underwritten and government managed so that if there were unexpected profits in one year they could be returned as reduced premiums or increased benefits in a following year(s).

Additional reform for consideration: Other factors increasing prices

The price of NSW Green Slips is also affected by the decreasing returns of the premiums held as investments by the insurers – something which this proposal does nothing to address, and which is arguably the most important factor driving prices up.

A note in the consultation paper recognises the role of this – though it is not the subject of any critical discussion.[13] Though it is recognised that there is a need for market investments given the low interest rate environment, having this kind of variability in the scheme is a major cause of price rises and should be recognised as such. What is not acknowledged in the consultation paper is that if/when a more buoyant investment market and interest rate environment returns then this would produce (in a well-managed scheme) reduced premiums.

[11] *Reforms to the NSW Compulsory Third Party Green Slip Insurance Scheme*, February 2013, page 6.
[12] *Reforms to the NSW Compulsory Third Party Green Slip Insurance Scheme*, February 2013, page 9.
[13] *Reforms to the NSW Compulsory Third Party Green Slip Insurance Scheme*, February 2013, page 5.

Additional reform for consideration: Administrative costs

An additional factor that has been shown to contribute to the inefficacy of the scheme is the bureaucratic processes associated with making claims. Currently compulsory processes such as the "medical assessment service" have drawn strong criticism from organisations such as the *Australian Lawyers Alliance* for creating additional time delays, extra costs, and not producing fair outcomes for victims within the scheme.

The 2005 report from GPSC 1 recommended the abolition of this service as one way of addressing costs. No steps have been taken towards this outcome despite it being one of the most obvious ways to cut costs without cutting benefits received by injured people.

Additional reform for consideration: non-retrospectivity

Although it does not appear to be explicitly stated, there are concerns that any changes to the scheme would be retrospective – discussion in the paper of "transitioning" people into the new scheme grounds this concern.[14]

There is no justification whatsoever for making any new scheme retrospective. In respect of past accidents insurers have already collected their premiums (including their excess profits) and they should have to pay out claims on the basis of such premiums.

Regards,

David Shoebridge
Greens NSW MP

[14] *Reforms to the NSW Compulsory Third Party Green Slip Insurance Scheme*, February 2013, page 12.